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Inverted Healthcare Staffing, LLC d/b/a United MedSource and Tamara Szabo-Schmid. Case 08–CA–174289

June 29, 2017

DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE
AND MCFERRAN

The General Counsel seeks a default judgment in this case pursuant to the terms of an informal settlement agreement. Upon a charge, a first amended charge, and a second amended charge filed by Tamara Szabo-Schmid on April 18, July 26, and July 29, 2016, respectively, the General Counsel issued a complaint on August 30, 2016, against Inverted Healthcare Staffing, LLC d/b/a United MedSource (the Respondent), alleging that it violated Section 8(a)(1) of the Act. On September 12, 2016, the Respondent filed an answer to the complaint.

Subsequently, the Respondent and Charging Party Szabo-Schmid executed an informal settlement agreement, which was approved by the Regional Director for Region 8 on October 28, 2016. Pursuant to the terms of the settlement agreement, the Respondent agreed, among other things, to (1) post at its facility the appropriate Board notice for 60 days; (2) make Szabo-Schmid whole by paying her \$4,496.80 in backpay; (3) remove from its files all references to Szabo-Schmid's termination and notify her in writing that this had been done and that the termination would not be used against her in any way;¹ and (4) rescind certain personal conduct, attention to duty, and confidentiality rules in the employee handbook.

The settlement agreement also contained the following provision:

The Charged Party agrees that in case of non-compliance with any of the terms of this Settlement Agreement by the Charged Party, and after 14 days' notice from the Regional Director of the National Labor Relations Board of such non-compliance without remedy by the Charged Party, the Regional Director will reissue the complaint previously issued on August 30, 2016 in the instant case. Thereafter, the General Counsel may file a Motion for Default Judgment with the Board on the allegations of the Complaint. The Charged Party understands and agrees that all of the al-

legations of the Complaint will be deemed admitted and its Answer to such Complaint will be considered withdrawn. The only issue that the Charged Party may raise before the Board will be whether it defaulted on the terms of this Settlement Agreement. The General Counsel may seek, and the Board may impose, a full remedy for each unfair labor practice identified in the Notice to Employees. The Board may then, without necessity of trial or any other proceeding, find all allegations of the Complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Charged Party on all issues raised by the pleadings. The Board may then issue an Order providing a full remedy for the violations found as is appropriate to remedy such violations. The parties further agree that a U.S. Court of Appeals Judgment may be entered enforcing the Board Order ex parte, after service or attempted service upon Charged Party at the last address provided to the General Counsel.

On November 2, 2016, the Compliance Officer for Region 8 (Compliance Officer), on behalf of the General Counsel, sent a compliance package to the Respondent's counsel, by regular mail, containing copies of the Notice to Employees, a Certification of Compliance form to be completed by an official of the Respondent and returned to Region 8, and a detailed letter of the Respondent's obligations under the settlement agreement. On November 7, 2016, the Respondent's counsel, by email, suggested that the Compliance Officer contact the Respondent's official Erick LaGroux directly concerning the Respondent's obligations under the settlement agreement.

On November 10, 2016, the Compliance Officer sent a duplicate compliance package to the Respondent's official Erick LaGroux, by regular mail, containing copies of the notice to employees, a certification of compliance form to be completed by an official of the Respondent and returned to Region 8, and a detailed letter of the Respondent's obligations under the settlement agreement.

On December 13, 2016, the Compliance Officer sent a letter to the Respondent, by regular mail, reminding the Respondent of the steps necessary to ensure compliance with its obligations under the settlement agreement and notifying the Respondent that, to date, it had failed to comply with the terms of the settlement agreement.

On January 19, 2017, the Acting Regional Director sent a letter to the Respondent and to the Respondent's counsel, by regular mail, notifying the Respondent that it had not complied with its obligations contained in the settlement agreement, and stating that unless the Respondent provided evidence of compliance or intent to comply with the settlement agreement within 14 days,

¹ The Notice to Employees included in the settlement agreement states that Szabo-Schmid waived reinstatement.

the complaint would be reissued and a motion for default judgment would be filed with the Board.

The Respondent failed to respond to the correspondence referred to above and failed to comply with any of the terms of the settlement agreement. Accordingly, pursuant to the terms of the noncompliance provisions of the settlement agreement, on April 21, 2017, the Regional Director issued a complaint based on breach of affirmative provisions of settlement agreement.

On April 24, 2017, the General Counsel filed a Motion for Default Judgment with the Board, requesting that the Board issue a Decision and Order against the Respondent containing findings of fact and conclusions of law based on the allegations in the reissued complaint, and provide “a full remedy for each and every unfair labor practice violation.” On April 26, 2017, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed no response. The allegations in the motion are therefore undisputed.

Ruling on Motion for Default Judgment

According to the uncontroverted allegations in the motion for default judgment, the Respondent has failed to comply with any of the terms of the settlement agreement. Consequently, pursuant to the noncompliance provisions of the settlement agreement set forth above, we find that the Respondent’s answer to the original complaint has been withdrawn and all of the allegations in the reissued complaint are true.² Accordingly, we grant the General Counsel’s Motion for Default Judgment.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

At all material times, the Respondent has been an Ohio limited liability company with an office and place of business in Youngstown, Ohio, and has been engaged in providing temporary employee staffing services to various hospitals in Ohio.

During the 12-month period ending December 31, 2015, the Respondent provided services valued in excess of \$50,000 for health care institutions located within the State of Ohio, including University Hospitals Health System, Inc., and The Cleveland Clinic Foundation, enterprises directly engaged in interstate commerce.

During the 12-month period ending December 31, 2015, the Respondent derived gross revenues in excess

of \$1 million and purchased and received at its Youngstown, Ohio facility products, goods and materials valued in excess of \$5000 directly from points outside the State of Ohio.

We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of the Respondent within the meaning of Section 2(11) of the Act and agents of the Respondent within the meaning of Section 2(13) of the Act:

Erick LaGroux	Chief Executive Officer
Jessica LaGroux	Officer
M. Constance Augustine-Thompson	Chief Financial Officer

At all relevant times until approximately mid-May 2016, the Respondent maintained the following policies and/or work rules as they appeared in the Respondent’s employee handbook, revised September 2007:

(A) Personal Conduct

-You may not exhibit inappropriate or unacceptable conduct

-You may not engage in fights, horseplay, or any form of boisterous or disorderly conduct while on assignment

(B) Attention to Duty

-You may not loiter or attend to personal business while on assignment

(C) Honestly (sic) and Confidentiality

-You must at all times maintain confidentiality of Company business records, operations, methods of doing business, client lists, employee lists, etc.

About November 2, 2015,³ the Respondent’s employee Tamara Szabo-Schmid engaged in concerted activities with other employees for the purposes of mutual aid and protection by engaging in discussions related to job security and/or by sending an email to other employees and the Respondent in which she raised concerns about job security.

About November 2, 2015, the Respondent terminated the employment of Tamara Szabo-Schmid. The Respondent did so because she engaged in the conduct described above and to discourage employees from engaging in these or other concerted activities.

² See *U-Bee, Ltd.*, 315 NLRB 667, 668 (1994). We note, however, that the complaint erroneously alleges that Szabo-Schmid’s concerted activity and termination occurred on November 2, 2016, rather than on November 2, 2015, as alleged in the charge and amended charges.

³ See fn. 2, above.

CONCLUSION OF LAW

By the conduct described above, the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act.⁴ The Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, and in accordance with the General Counsel's request for a "full remedy" for the violations found, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(1) of the Act by terminating the employment of Tamara Szabo-Schmid, we shall order the Respondent to offer Szabo-Schmid full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed. In addition, we shall order the Respondent to make Szabo-Schmid whole for any loss of earnings and other benefits suffered as a result of the unlawful action against her. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with our recent decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in relevant part No. 16-1316, 2017 WL 2485311, __ F.3d __ (D.C. Cir. June 9, 2017), we shall also order the Respondent to compensate Szabo-Schmid for her search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings.⁵ Search-for-work and interim employment expenses shall

be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.⁶

The Respondent additionally shall be ordered to remove from its files any references to the termination of Szabo-Schmid and to notify her in writing that this has been done and that the termination will not be used against her in any way. We shall further order the Respondent to compensate Szabo-Schmid for any adverse tax consequences of receiving a lump-sum backpay award and to file with the Regional Director for Region 8 a report allocating the backpay award to the appropriate calendar years. *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016).

Having found that the Respondent has violated Section 8(a)(1) by maintaining unlawful handbook rules, we shall order the Respondent to rescind the unlawful rules to the extent it has not already done so. Pursuant to *Guardsmark, LLC*, 344 NLRB 809, 812 fn. 8 (2005), enfd. in part 475 F.3d 369 (D.C. Cir. 2007), the Respondent may comply with our order of rescission by rescinding the unlawful provisions and republishing its handbook without the unlawful rules. We recognize, however, as we did in *Guardsmark*, that republishing the handbook could be costly. Accordingly, the Respondent may supply the employees either with inserts to the handbook stating that the unlawful rules have been rescinded, or with new and lawfully worded rules on adhesive backing that will correct or cover the unlawful rules, until it republishes the handbook without the unlawful provisions. Any copies of the handbook that include the unlawful rules must include the inserts before being distributed to employees. See, e.g., *Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip. op. at 8 (2014), enfd. 629 Fed.Appx. 33 (2d Cir. 2015).

ORDER

The National Labor Relations Board orders that the Respondent, Inverted Healthcare Staffing, LLC d/b/a United MedSource, Youngstown, Ohio, its officers, agents, successors, and assigns shall

1. Cease and desist from

⁴ The Board finds the violations here based on the Respondent's breach of the prior settlement agreement, resulting in the withdrawal of Respondent's answer, which means there is no defense to the complaint's allegations, and the allegations are therefore admitted as true. Accordingly, Chairman Miscimarra expresses no views as to whether he would have found the policies and/or work rules in the Respondent's Employee Handbook unlawful if the Respondent had put the lawfulness of those rules at issue. However, he disagrees with *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004), which articulated the current standard that the Board applies when evaluating the legality of facially neutral rules, employment policies and employee handbook provisions, and Chairman Miscimarra adheres to the views he expressed in *William Beaumont Hospital*, 363 NLRB No. 162, slip op. at 7-24 (2016) (Member Miscimarra, dissenting).

⁵ For the reasons stated in his separate opinion in *King Soopers*, 364 NLRB No. 93, slip op. at 12-16, Chairman Miscimarra would adhere to the Board's former approach, treating search-for-work and interim employment expenses as an offset against interim earnings.

⁶ The General Counsel additionally seeks a make-whole remedy that includes reasonable consequential damages incurred as a result of the Respondent's unfair labor practices. This issue, which was not briefed, would involve a change in Board law. We are not prepared at this time to deviate from our current remedial practice. Accordingly, we decline to order this relief at this time. See, e.g., *Laborers International Union of North America, Local Union No. 91 (Council of Utility Contractors)*, 365 NLRB No. 28, slip op. at 1 fn. 2 (2017).

(a) Maintaining unlawful personal conduct, attention to duty, and confidentiality rules in its employee handbook.

(b) Terminating the employment of employees because they engage in protected concerted activities, and to discourage employees from engaging in these activities.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) To the extent it has not already done so, rescind the following unlawful handbook rules:

(A) Personal Conduct

-You may not exhibit inappropriate or unacceptable conduct

-You may not engage in fights, horseplay, or any form of boisterous or disorderly conduct while on assignment

(B) Attention to Duty

-You may not loiter or attend to personal business while on assignment

(C) Honestly (sic) and Confidentiality

-You must at all times maintain confidentiality of Company business records, operations, methods of doing business, client lists, employee lists, etc.

(b) Revise the employee handbook to delete the above unlawful rules and advise employees in writing that it has done so and that the unlawful rules will no longer be enforced.

(c) Furnish all current employees with inserts for the employee handbook that (1) advise that the unlawful rules have been rescinded, or (2) provide the language of lawful policies; or publish and distribute to all current employees a revised employee handbook that (1) does not contain the unlawful rules, or (2) provides the language of lawful policies.

(d) Within 14 days from the date of this Order, offer Tamara Szabo-Schmid full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(e) Make Szabo-Schmid whole for any loss of earnings and other benefits she may have suffered as a result of the unlawful termination of her employment, in the manner set forth in the remedy section of this decision, plus reasonable search-for-work and interim employment expenses.

(f) Compensate Szabo-Schmid for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 8, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(g) Within 14 days from the date of this Order, remove from its files any reference to the unlawful termination of Szabo-Schmid, and within 3 days thereafter, notify her in writing that this has been done and that the termination will not be used against her in any way.

(h) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(i) Within 14 days after service by the Region, post at its facility in Youngstown, Ohio, copies of the attached notice marked "Appendix."⁷ Copies of the notice, on forms provided by the Regional Director for Region 8, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 2, 2015.

(j) Within 21 days after service by the Region, file with the Regional Director for Region 8 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. June 29, 2017

Philip A. Miscimarra, Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT maintain unlawful personal conduct, attention to duty, and confidentiality rules in our employee handbook.

WE WILL NOT terminate your employment because you engage in protected concerted activities, and to discourage employees from engaging in these activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, to the extent we have not already done so, rescind the following unlawful handbook rules:

(A) Personal Conduct

- You may not exhibit inappropriate or unacceptable conduct
- You may not engage in fights, horseplay, or any form of boisterous or disorderly conduct while on assignment

(B) Attention to Duty

- You may not loiter or attend to personal business while on assignment

(C) Honestly (sic) and Confidentiality

- You must at all times maintain confidentiality of Company business records, operations, methods of doing business, client lists, employee lists, etc.

WE WILL revise the employee handbook to delete the above unlawful rules and WE WILL advise employees in writing that we have done so and that the unlawful rules will no longer be enforced.

WE WILL furnish all current employees with inserts for the employee handbook that (1) advise that the unlawful rules have been rescinded, or (2) provide the language of lawful policies; or publish and distribute to all current employees a revised employee handbook that (1) does not contain the unlawful rules, or (2) provides the language of lawful policies.

WE WILL, within 14 days from the date of the Board's Order, offer Tamara Szabo-Schmid full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Tamara Szabo-Schmid whole for any loss of earnings and other benefits suffered as a result of her unlawful termination, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL compensate Tamara Szabo-Schmid for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 8, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful termination of Tamara Szabo-Schmid, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the unlawful termination will not be used against her in any way.

INVERTED HEALTHCARE STAFFING, LLC D/B/A
UNITED MEDSOURCE

The Board's decision can be found at www.nlr.gov/case/08-CA-174289 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

